

SOUTH AFRICA / JUDGMENT

D.A.D.P v S.D.P (A49/2024; 34/2021)

[2025] ZAMPMHC 21 (27 March 2025)

[2025] ZAMPMHC 21**COURT**

Middelburg High Court, Mpumalanga

BEFORE

Malangeni, Langa

CASE / FILE NUMBER

A49/2024; 34/2021

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Policy**IN**

**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION,
MIDDELBURG**

APPEAL CASE NO:

A49/2024

CASE NO: 34/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES

SIGNATURE

DATE: 27/5/25

In the matter between:

D[...]

A[...] D[...] P[...]

APPELLANT

and

S[...]

D[...] P[...]

RESPONDENT

This

judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is

deemed to be the 27 March 2025 at 14h00.

JUDGMENT

Coram: Malangeni AJ et Langa J

Malangeni AJ

Introduction

[1] This is an appeal against the judgement of the regional court magistrate sitting at Middleburg in respect of divorce proceedings finalised on 28 March 2024. The appeal stems from a divorce spousal maintenance that is governed by section 7(2) of the Divorce Act 70 of 1979 ("Divorce Act"). This appeal is preceded by an unopposed application for condonation.

[2] On 28 March 2024, the parties got divorced and the court issued the following order:

2.1 That the bonds of marriage subsisting between the Plaintiff and the Defendant be and are hereby dissolved;

2.2 Division of joint estate in terms of the applicable matrimonial system which should include the loan amount of R96 609.00 which amount was a debt of the joint estate;

2.3 The Plaintiff must pay maintenance in the sum of R8 000.00 per month for the Defendant from 1 May 2024 and thereafter on or before the 1st of each succeeding month until she remarries or until her death;

2.4 The Plaintiff must retain the Defendant as a beneficiary on his medical aid scheme until she remarries or until her death;

2.5 The Plaintiff is responsible for all reasonable medical expenses not covered by the medical aid;

2.6 The Plaintiff is ordered to pay the taxed cost of the Defendant on a party and party basis.

- [3] The appeal is noted against paragraphs 4, 5.1 and 5.2 of the order of the court a quo, this being paragraphs 2.3, 2.4 and 2.5 above.

The grounds of appeal are as follows:

- [4] The Magistrate erred in finding that the Respondent proved that she is in need of spousal maintenance.
- [5] The Magistrate erred in finding that the Respondent cannot work, when she testified that she is able to work part time, and it was also indicated by both expert witnesses that the Respondent can work from home.
- [6] The Magistrate erred in finding that the Respondent will not be able to maintain herself or generate income, when it was testified that the Respondent is able to obtain part time, online, and home teaching work, should she be able to obtain the necessary equipment which the Appellant indicated/testified that he will assist her to get. It was also testified by the Appellant that he provided the Respondent with several online/part time work opportunities which the Respondent ignored until about two weeks before the trial started.
- [7] The Magistrate erred in finding that the Respondent is not living a normal life when Mr Anthony Boucher, a private investigator that surveilled the Respondent on two occasions, testified that he found that the Respondent was acting as a normal person in public places. Even Mr D[...] P[...] (snr) (the Appellants father) and Mrs S[...] (the Appellants mother) testified that they both saw the Respondent on different occasions at school during sport, between several persons without a mask and acting as any normal person would do.
- [8] The Magistrate erred in finding that the Appellant is able to pay spousal maintenance when it was never put to him or testified by the Respondent what amount of maintenance she requires.
- [9] The Magistrate erred in finding that the Respondent's expenses are R13 950.00 and that the income that the Respondent will receive will only cover her short fall when the Respondent did not clearly, with certainty testify or prove what her monthly expenses were, nor did she produce any documentation in this regard.
- [10] The Magistrate erred in finding that the Respondent shares her accommodation with her father to cover her expenses when it was never testified by the Respondent nor her father Mr K [...], that he stays with her to assist her financially. Further the Respondent testified that she would use the 50% of the Appellant's pension fund she will receive to buy a little house for her son and not for her father.
- [11] The Magistrate erred in finding that the Respondent could not generate an income when it was testified that she will apply for her SASSA grant, the Respondent would also receive an amount of almost R1 150 000.00 from the Appellant's pension fund as well as 50% of the accrual of the profit of their house which was sold.

- [12] The Magistrate erred in finding that due to the fact that the Appellant has the means to pay, he needs to pay spousal maintenance to the Respondent.
- [13] The Magistrate erred in finding that the Respondent needs to remain on the medical aid of the Appellant when it was proved that the Cystic Fibrosis Unit at the Charlotte Maxeke Hospital re-opened and could supply the Respondent with all her medication and treatments free without any cost. The Respondent testified that she received all her treatments and medication at Cystic Fibrosis Unit at Charlotte Maxeke Hospital before it closed three years ago due to covid and financial needs. The Appellant also testified that his medical aid does not allow that a divorced spouse could be kept registered on a members medical aid as beneficiary after divorce.
- [14] The Magistrate erred in finding that the Respondent is entitled to spousal maintenance without considering the fact that the Appellant has been paying spousal maintenance to the Respondent in terms of the Rule 58 order granted on 6 July 2021.
- [15] The Magistrate erred in finding that the Respondent is entitled to spousal maintenance until she remarries or her death without considering rehabilitative maintenance to enable the Respondent to become financially independent from the Appellant and allowing a clean break between the parties.

Brief Background

- [16] The Appellant was the Plaintiff, and the Respondent was the Defendant in the proceedings before the court a quo. The parties got married out of community of property with the accrual system on 14 March 2009. From their marriage, one child was born on 11 April 2011. The parties had not been living together since January 2021 and the Appellant has been paying interim maintenance of R7 500.00 per month in favour of the Respondent and a sum of R4 000.00 per month in favour of the minor child. The parties do have a house, and it is common cause that the house would be sold and the proceeds thereof are to be shared equally between the parties. It is further common cause that the Respondent would be entitled to 50% share in the pension interest of the Appellant. During divorce proceedings, a number of witnesses testified.

The Appellant tendered the following evidence:

- [17] In his brief evidence the Appellant stated that they agreed that primary resident of the minor child would be vested with the Respondent. He would have reasonable rights of contact with the minor child. He stated that an order in terms of Rule 58 was issued on 6 July 2021 and he has been complying with that order since then.

- [18] He stated that the movable assets have been divided. The Respondent will be entitled to her 50% of the pension fund interest. He disputes the fact that the Respondent is not able to work due to being diagnosed with cystic fibrosis. He stated that although the Respondent is suffering from this disease, she lives a normal life like any other normal person. This has been confirmed by the private investigator who surveilled her on two occasions, at a wrestling event of the minor child and on a weekend away at De Voetpadkloof resort.
- [19] The Appellant called a witness Mr Boucher, his brief evidence was that he is the private investigator. During his surveillance of the Respondent, he found her to be acting as any normal person would act. At the indoor swimming pool at De Voetpadkloof, he saw the Respondent with her mouth not covered while she was in the water and this clearly shows that she has no regard to being infected with some viruses. Any person diagnosed with cystic fibrosis would not have done so.
- [20] The Appellant called another witness Mr D[...] P[...], his brief evidence was that he is the father to the Appellant. He saw the Respondent at the minor child's sport event at the school and she did not wear a mask whilst amongst all the people at the event.
- [21] The Appellant thereafter called another witness Mrs S[...] whose brief evidence was that she is the mother to the appellant. She stated that the Respondent said on numerous occasions that she would financially ruin the Appellant should the latter proceed with a divorce.

The Respondent tendered the following evidence:

- [22] The Respondent testified and stated that she was 42 years old, she had been married to the Appellant for 15 years and that they were in separation for the past 3 years. They have a 12-year-old boy child. She is a teacher by profession with a Diploma qualification.
- [23] Before the marriage, she worked at B[...] with the Grade RR children and during her first years of marriage, she worked at K[...] Primary School in Middleburg until her health was affected by her work.
- [24] She stated further that when she was two and a half years old, she was diagnosed with cystic fibrosis. Currently, she needs 26 different types of medication and therefore needs a medical aid. Without it, she would die. She mentioned that Charlotte Maxeke state hospital had a Cystic Fibrosis Unit, where her current doctor, Dr Baird, treated her. However, this unit was closed about 3 years ago due to insufficient funds and covid. She indicated that she used to receive all her medication from that unit.
- [25] She stated that her monthly income was R 11 500.00 (being R4000.00 for the child and R7500.00 from the Spousal Maintenance) and she had a R10 000.00 overdraft. She indicated that she would spend the pension interest as follows:

25.1 Invest some of the money and earn interest on it.

25.2 Buy a new motor vehicle.

25.3 Buy a small house for her and her son.

25.4 And use some of the money for a lung transplant should she need to.

[26] She further stated that she would file an application for her SASSA grant and will apply for part time work which she could do from her home, if her health allows it, to earn an income and to provide in her monthly expenses.

[27] The Respondent also called as a witness her father, JA K[...], who briefly stated that the Appellant knew about the Respondent's ill health before they got married. He stated further that he stays with the Respondent and he assists with the rent of the house and is responsible for the payment of the following:

27.1 Half of the house rent;

27.2 Internet/ fiber for the households;

27.3 A house cleaner once a week; and

27.4 Food for himself.

Issue to be determined

[28] The Appellant challenges paragraphs 4, 5.1 and 5.2 of the divorce order (paragraphs 2.3, 2.4 and 2.5 above).

The Appellants contentions

[29] The Appellant's Legal Representative submitted the following:

29.1 That the Respondent failed to prove that she is entitled to maintenance as she testified that she is able to work, be it part time from home, and there is even a possibility to obtain online teaching work through TENEO should she obtain the necessary equipment. She will further apply for her SASSA grant and will receive a lumpsum from the Appellant's pension fund interest.

29.2 Further with regards to the Respondent's claim for a medical aid, it is also submitted that she did not prove that she is entitled to a medical aid or contribution to a medical aid.

29.3 He submitted further that it was clearly proved that the cystic fibrosis unit at Charlotte Mxeke State Hospital is open again as testified by the Respondent herself, she was previously treated at this unit and received all her medication at this unit until it closed.

The Respondent's Contentions

[30] The legal representative for the Respondent submitted that the court will have to take into account the expert evidence given and the medical condition of the Respondent. The medical condition being a very specialized disease of the lungs.

The Applicable Law

[31] The Appellant is noting an appeal against facts or finding of the trial court. It is trite that the appeal court can only interfere with the trial court's decision on grounds of misdirection or irregularity. In *Mentz v Simpson*,^[1] the court held that a court of appeal does not readily interfere with a maintenance order awarded in a trial court but will do so if there is a misdirection or irregularity.

[32] This appeal originates from divorce spousal maintenance that is governed by section 7(2) of the Divorce Act. This section provides as follows:

"In the absence of an order made in terms of subsection (1) with regard to payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage, an order in terms of subsection

(3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur."

[33] From the mere reading of this section, it gives the trial court a discretion in issuing a just order. In *M V M*,^[2] the court said that:

"It is trite that the Court then makes a maintenance order which it finds 'just' ... In considering what is just, this in effect signifies that the court exercises a judicial discretion when coming to a conclusion what is correct and appropriate and fair and reasonable in the circumstances of the case."

Discussion and

Analysis

[34] I am of the view that the discussion of this matter should be based on the contents of Exhibits "F" (the Joint Expert Report) which explains the effect and impact of cystic fibrosis on the Respondent. Paragraph 4.4 of Exhibit "F" under heading "opinion on future prognosis of the patient" states the following:

"Cystic fibrosis is an inherited, progressive, life limiting condition for which there is currently no cure. Lung function can be expected to decline over time. Patients with cystic fibrosis will eventually develop respiratory failure from which they usually demise. Treatment is aimed at preventing and treating complications and slowing the rate of decline in lung function. Lung transplantation is an option for qualifying patients at the end of life but is fraught with complication and poor life expectancy. New (FTR modulator therapy is available in some high-income countries but is currently not registered in any low- or middle-income country, including South Africa. When Mrs. DuPlooy's lung function reaches approximately 30% of expected, it is likely that she will require supplemented oxygen and become a candidate for lung transplantation, meaning that it would be anticipated that she would not

survive for more than three years after that time.” (sic)

[35] At paragraph 4.6 under the heading “What is the suggested future treatment and care” the report states the following:

Mrs. D[...] P[...] will need to continue with her:

35.1 Twice daily respiratory physiotherapy.

35.2 Inhale bronchodilator and mucolytic therapy.

35.3 Chronic suppressive antibiotics.

35.4 Nutritional supplementation.

35.5 Pancreatic enzyme replacement therapy.

35.6 Insulin.

35.7 Frequent medical review.

35.8 Early intervention for pulmonary exacerbation.

35.9 Screening for other complications due to CF.

[36] The exhibit further states as follows:

36.1 It is prudent that Mrs D[...] P[...] remain on a good medical aid for the rest of her life.

36.2 Could the patient be employed with her current circumstance in the open market? No. If not, the reason therefor?

36.3 Mrs. D[...] P[...]’s treatment burden precludes full time employment.

36.4 Potential cross infection with even mild viral pathogens in the typical workspace may trigger pulmonary exacerbation, leading to an increased rate of deterioration in lung function.

36.5 Requirement for excessive sick leave both for frequent, prolonged hospitalisations and for regular outpatient follow up would be intolerable to a typical employer. Paragraph 5 of Exhibit F further states: any other observation which should be taken into consideration: Mr. and Mrs. D[...] P[...] have an 11-year-old son. It is essential to delay Mrs. D[...] P[...]’s inevitable death from Cystic Fibrosis for as long as possible, so as to enable their son to reach adulthood with both of his parents. Continuing Mrs. D[...] P[...]’s current, or equivalent, medical aid will go a long way to achieving this.

[37] It is clear that the trial court took cognisance of Exhibit “F” in its Judgement. From my understanding of Exhibit “F”, the Respondent is suffering from a serious medical condition. The doctors have made it clear that currently there is no available cure. This is a disease that needs constant medical care and attention. The Respondent will need future treatment and care which is detailed in Exhibit “F” from paragraph 4.6 to 4.6.10.

- [38] I take what is contained in paragraph 4.6.10 (paragraph 36.1 above) as a recommendation by the experts. They say, “It is prudent that Mrs. D[...] P[...] remain on a good medical aid for the rest of her life”.
- [39] In paragraph 4.7 to 4.7.2.1 (paragraphs 36.2 and 36.3 above) they clearly indicate that the Respondent is and will never be employable by stating that Mrs D[...] P[...]’s treatment burden precludes full time employment.
- [40] Considering the nature of the Respondent’s illness and the nature of treatment in use, I am of the view that a medical aid is of utmost importance for her benefit. This is the measure that may sustain the life of the Respondent. The respondent has a right to health care in terms of the Constitution. Section 27(1) states that everyone has the rights to have access to health care services, including reproductive health care.
- [41] After considering the evidence on both sides I am of the view that the circumstances do not justify the removal of the Respondent from the Appellant’s medical aid scheme.
- [42] Furthermore, regarding the spousal maintenance, the same factor that she will not be able to work on a permanent basis is relevant. The Appellant never complained about non affordability; for example, what he only raised is that his income was not questioned. He is a person of means and did not struggle to pay the interim maintenance order for example.
- [43] The total expenses of the Respondent as reflected in the court a quo’s judgement totalling to R13 950.00 per month and the fact that she will be unlikely to work on a full-time basis justifies the conclusion that Respondent is entitled to spousal maintenance in terms of the order of the trial court. The amount set by the trial court is fair and reasonable.
- [44] It is on these grounds that I cannot find any reason to interfere with the trial court’s ruling or judgement. In my judgment the presiding judicial officer in the trial court exercised her discretion judicially. She considered all the relevant facts and correctly applied the relevant law to the facts and therefore the appeal has to fail.
- [45] Concerning the condonation application, it was unopposed and the Appellant in my view advanced good grounds for the granting thereof. The condonation application is as a result granted.
- [46] It is trite that costs follow the successful party. However, the court has a discretion when it comes to the award of costs. The appeal having failed, the Respondent is accordingly entitled to costs. I therefore intend making an order awarding the costs to the Respondent.
- [47] As a result, I make the following order:
1. The condonation for the late filing of the appeal is hereby granted.
 2. The lapsed appeal is hereby re-instated.
 3. The appeal is hereby dismissed.

4. The Appellant is to pay the costs of the appeal.

M MALANGENI

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered,

B LANGA

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MIDDELBURG

Appearances

For the Appellant: HJ Lombard Wynand Prinsloo Inc. For the Respondent: Van DeVenter & Campher Attorneys Date of hearing: 08 November 2024 Date of judgment: 27 March 2025

[1] Mentz v Simpson 1990

(4) SA 455 (A) at 456E-J.

[2] M V M [2018] ZAGPPHC 607 para 12.

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Prepared on 10 October 2026 · Esheria